

99-81

October 20, 1999

D.T.E. 99-81

Petition of The Berkshire Gas Company, Pursuant to G.L. c. §§ 76 and 94A, for Approval  
by the Department of Telecommunications and Energy of a Gas Resource Portfolio  
Management Contract

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FOR: THE BERKSHIRE GAS COMPANY

Petitioner

- Introduction

On September 29, 1999, the Berkshire Gas Company ("Berkshire" or "Company") filed  
for approval with the Department of Telecommunications and Energy ("Department") an

Agency Agreement for Management of Natural Gas Supply, Storage and Transportation Assets ("Agreement") between itself and Energy USA-TCP Corporation ("TCP") (Berkshire Letter of September 29, 1999, at 1). Simultaneously, the Company filed a Motion for Confidential Treatment ("Motion") requesting that price-related, competitively sensitive terms of the Agreement be accorded confidential treatment (id.). The Company has requested the Department's approval by October 20, 1999 (id.). The Department has received no comments, regarding Berkshire's application from any other party.

The Agreement is a result of a portfolio auction process, which was initiated by the issuance of an RFP by the Company on July 30, 1999 (Berkshire Letter of August 20, 1999, at 1). The Company sent RFPs to 12 potential companies with whom Berkshire either had a prior working relationship or had expressed an interest in bidding for the Company's portfolio. (D.T.E. 1-6).

- Description of the Proposed Agreement

The proposed one-year Agreement with TCP will run from November 1, 1999 through October 31, 2000 (Agreement at 7). The Agreement provides for TCP to serve as Berkshire's agent in managing the Company's upstream supply resources while obligating TCP to provide all of Berkshire's firm natural gas needs. The Agreement may be extended by mutual agreement of the contracting parties and subsequent approval of the Department (Agreement at 7). The Agreement details the responsibilities of the Company and TCP including among other matters, Authority of Agent, Asset Management Payment, Nominations and Dispatching, Quantities and Pricing, Storage Rights, Gas Supply Sales from Principal to Agent, Billing and Payment, Excuse of Performance, Regulatory Oversight, Taxes, Quality and Pressure, and Resolution of Disputes. The Agreement, which does not include downstream assets, allows for adjustment of the amount of capacity available to TCP to reflect the volume of migration from sales to transportation. TCP's payment to Berkshire (for the right to manage its portfolio) was designed to be paid in twelve equal monthly installments (id. at 8). In response to information request DTE-2-3 the Company proposes to treat the mitigation revenues received from TCP in accordance with the margin-sharing rules established in Interruptible Transportation/Capacity Release D.P.U. 93-141-A ("D.P.U. 93-141-A").

### III. DISCUSSION

- Standard of Review

Berkshire has requested approval of the execution of a one-year Agency Agreement for Management of Natural Gas Supply, Storage and Transportation Assets by TCP. Because the Company will be procuring its gas supply from TCP pursuant to the terms of this Agreement and because the Company's customers will be responsible for gas costs as passed-through the Company's CGAC, the Department assesses the merits of the Company's Request for approval in accordance with the requirements of G.L. c. 164, § 94A. <sup>(1)</sup> The Department acknowledges that the Company is not seeking our approval for

new or different gas commodity or capacity contracts. Rather, Berkshire is seeking our approval for (1) outsourcing previously-approved contracts and (2) assigning the management responsibility of those contracts to TCP. Under these circumstances, we find that G.L. c. 164, § 76 also applies. Thus, we also evaluate the Agreement under our general supervisory powers. In addition, because this Agreement is the result of an RFP process sanctioned and encouraged by the Department in NOI - Gas Unbundling, D.T.E. 98-32-B, we review the Company's chosen RFP process for consistency with the requirements of that Order.

- Analysis and Findings
  - Benefits to Ratepayers

The record indicates that the RFP process was consistent with the specified standards. Bids were submitted to a broad range of the most likely bidders. Moreover, the Department has received no objections to indicate that a potential bidder was unfairly excluded from either initial consideration as a bidder or that any bid was unfairly evaluated. The bid evaluation process was clearly stated, evaluation criteria provided, opportunity allowed for bidders to receive clarification, and a sample contract provided so that bidders and others might understand the Company's objectives and actions. The record indicates that the Agreement will produce revenues to Berkshire in excess of those offered by the competing proposals.

The Department's review of the Company's proposal indicates that the Agreement is consistent with Berkshire's resource portfolio objectives. Under the proposed Agreement, TCP will manage Berkshire's upstream interstate gas supply, transportation and underground storage contracts. Because all of the subject contracts have been previously approved by the Department and are, therefore, consistent with the Company's resource portfolio objectives, this Agreement, which merely transfers day-to-day managerial responsibility over these contracts to TCP is, perforce, also consistent with the Company's resource portfolio objectives.

Furthermore, our review of Berkshire's Agreement indicates that it compares favorably to current market offerings considering price and non-price factors, as well as current market conditions facing the Company at the time of the execution of the Agreement. Gas prices under the Agreement will remain consistent with those that the LDC would experience in the absence of the Agreement. Therefore, the benefits to customers are in the form of the management fee paid to the Company. Under the proposed arrangement, the management fee will replace the mitigation revenues traditionally earned by Berkshire in managing its portfolio. Therefore, to constitute a net benefit to consumers, the fee must equal or exceed the level of mitigation revenues that would otherwise occur. The Company has provided to the Department, sufficient information indicating that the fee exceeds the level of mitigation revenues that would otherwise occur.

- Ratemaking Treatment.

As stated above, the Company has proposed to treat the costs and revenues associated with the Agreement consistent with the treatment authorized in D.P.U. 93-141-A.

In D.P.U. 93-141-A at 60, the Department found that the presence of symmetrical benefits provides sufficient incentives for LDCs to maximize Interruptible Transportation ("IT") and Capacity Release ("CR") margins. Further, in allowing LDCs to retain a portion of the margins generated from CR transactions, the Department sought to provide the LDCs with an incentive to market their excess capacity aggressively. D.P.U. 93-141-A at 61. Consequently, LDCs were allowed to retain 25 percent of the margins earned above a threshold which is adjusted annually to reflect Interruptible Sales, IT and CR transactions for the 12-month period ending April 30 of each year. D.P.U. 93-141-A at 64.

The Department finds that the proposed Agreement will result in lower gas costs to customers than there would have been absent the portfolio auction process. Accordingly, we find that the Company is entitled to the rewards established in D.P.U. 93-141-A because it developed the Agreement which provides more benefits to its customers than the mitigation efforts undertaken by Berkshire in the most recent years.<sup>(2)</sup>

- Market Power Concerns

Although the Department continues to be concerned about the potential for market power abuse by a dominant gas supplier (see Portfolio Auction/Boston Gas et al., D.T.E. 99-76 at 23-26), we note that (1) the capacity to be transferred under this Agreement is only a small fraction of the total capacity that flows into Massachusetts, and (2) the term of the Agreement is one year. However, we wish to impose upon Berkshire and TCP the same conditions that were imposed in D.T.E. 99-76. The Department, therefore, approves this Agreement subject to TCP's agreeing not to offer the portfolio assets to a competitive affiliate, or to customers of one of its competitive affiliates, without simultaneously posting the offering electronically on a source generally available to the market or otherwise making a sufficient offering to the market. In addition, we retain the right to monitor the activities of TCP through our jurisdiction over the LDCs. As provided in D.T.E. 98-32-B at 56, Berkshire is required to file with the Department annual progress reports describing the Agreement's financial and service effect on the Company's customers. To ensure that these reports inform the Department on the question of affiliate transactions by TCP, the Agreement must be amended to provide that TCP shall inform Berkshire quarterly as to the terms of affiliate transactions under the Agreement between TCP and any competitive affiliate or customers of that affiliate. Berkshire shall participate with the other LDCs and the Collaborative to develop market power standards as directed in D.T.E. 99-76.

#### IV. MOTION FOR PROTECTIVE TREATMENT

- Introduction

The Company attached a redacted copy of the Agreement to its Request and submitted a motion seeking protective treatment of the redacted terms (Motion for Confidential Treatment of the Berkshire Gas Company at 2). Specifically, the Company requests that the Department grant protective treatment of the following information: (1) the prices of gas and related services; and (2) quantities and other terms that the Company has negotiated with TCP (id.).

- Position of the Company

According to the Company, disclosure of the fee and related terms would be commercially harmful to Berkshire because it may hinder its ability to obtain advantageous services and pricing provisions in the future (Motion at 3). Further Berkshire asserts that disclosure of the pricing information and related proprietary terms in the Agreement and related testimony may prohibit asset managers and suppliers from marketing supplies in Massachusetts (id. at 3, 4).

- Standard of Review

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that

the [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

G.L. c. 25, § 5D exempts the Department, in certain narrowly defined circumstances, from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute "trade secrets, confidential, competitively sensitive or other proprietary information"; second, the party seeking protection must overcome the statutory presumption that all such information is public information by proving the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need. G.L. c. 25, § 5D.

Previous Department applications of the standard set forth in G.L. c. 25, § 5D reflect the narrow scope of this exemption. See Standard of Review for Electric Contracts, D.P.U. 96-39, at 2, Letter Order (August 30, 1996) (Department will grant exemption for

electricity contract prices, but "[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer."); Colonial Gas Company, D.P.U. 96-18, at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing). All parties are reminded that requests for protective treatment have not been and will not be automatically granted by the Department. A party's willingness to enter into a nondisclosure agreement does not resolve the question of whether the response should be granted protective treatment. Boston Edison Company, D.T.E. 97-95, Interlocutory Order on: (1) Motion for Order on Burden of Proof, (2) Proposed Nondisclosure Agreement, and (3) Requests for Protective Treatment (July 2, 1998).

- Analysis and Findings

As provided above, our standard of review requires that a proponent of protective treatment prove that the information for which protection is sought constitutes "trade secrets, confidential, competitively sensitive or other proprietary information." G.L. c. 25, § 5D. We conclude that the proponent has proven the need for protection and has overcome the statutory presumption favoring public disclosure. In short, we find that protective treatment of such competitively sensitive information is appropriate because disclosure may affect future negotiations by either constraining the willingness of managers to offer better or more innovative terms, or limit the bargaining ability of the Companies. However, because the changes in the business environment quickly diminish the value of today's competitively sensitive information and tip § 5D's scales in favor of later disclosure, we will protect the information only for a one-year period. At that time, Berkshire may renew its request for confidential treatment if the Company believes it is still appropriate and can show it is supportable.

- ORDER

Accordingly, after due notice and consideration, it is hereby

ORDERED: That the Agency Agreement for Management of Natural Gas Supply, Storage and Transportation Assets as seller and Energy USA-TCP as buyer be, and hereby is approved in accordance with the terms of this Order; and it is

FURTHER ORDERED: That the Berkshire Gas Company shall comply with all the directives contained herein.

By Order of the Department,

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James Connelly, Commissioner

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

1. G.L. c. 164, § 94A provides in pertinent part:

No gas . . . company shall . . . enter into a contract for the purchase of gas . . . covering a period in excess of one year without the approval of the [D]epartment. . . . Any contract covering a period in excess of one year subject to approval as aforesaid, and which is not so approved . . . shall be null and void.

2. The Department notes that during the terms of the Agreement, by operation of the margin sharing formula established in D.P.U. 93-141-A, Berkshire will retain 25 percent of the amount in excess of the applicable mitigation revenue threshold of \$345,209 (Exh. DTE 1-2). The remaining management fee revenues will be credited to Berkshire's firm sales customers through its CGAC filings.